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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-205

JON RANDOLPH FLOYD, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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No. .....

JON RANDOLPH FLOYD, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on April 13, 1973, affirming petitioners' conviction in the United States District Court for the Western District of Oklahoma for violating Title 18, U.S.C. §1382.

Opinions Below

The opinion of the United States Court of Appeals affirming the judgment of the District Court is reported at 477 F.2d 217 (10th Cir. 1973). It is set out in the Appendix, *infra*, pp. 1a-12a. The order of the United States Court of Appeals denying the petition for a rehearing *en banc* is set out in the Appendix, *infra*, p. 13a. The opinions of the District Court are reported at 345 F. Supp. 283 (D. Okla. 1972) and set out in the Appendix, *infra*, pp. 15a-34a.

Jurisdiction

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 13, 1973, and a timely petition for rehearing *en banc* was denied on May 3, 1973. By order dated June 30, 1973, Mr. Justice White extended the time to file this petition to and including July 30, 1973. This Court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a conviction for entering a military base under 18 U.S.C. section 1382 can be sustained in the absence of proof of a specific intent to enter in violation of a lawful base regulation.

2. Whether persons charged with a petty offense under federal law are entitled to a trial by jury when Congress has not specifically provided otherwise.

Statutes and Regulations Involved

18 U.S.C. §1382 provides as follows:

> Whoever, within the jurisdiction of the United States goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not

to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500.00 or imprisoned not more than six months, or both.

18 U.S.C. §3401(b) provides as follows:

Any person charged with a minor offense may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial before a judge of the district court and that he may have a right to trial by jury before such judge and shall not proceed to try the case unless the defendant, after such explanation, signs a written consent to be tried before the magistrate that specifically waives both a trial before a judge of the district court and any right to trial by jury that he may have.

18 U.S.C. §3401(f) provides as follows:

As used in this section, the term "minor offenses" means misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both . . . .

Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates provides as follows:

(a) Complaint or Citation. The trial of a petty offense may proceed on an information filed with the clerk of

the district court or on a complaint, citation, or violation notice filed with the magistrate.

(b) Consent; Arraignment. The magistrate shall state to the defendant the charge against him and shall inform the defendant of his right to counsel and to a trial in the district court. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, nolo contendere. If the defendant pleads not guilty the magistrate shall either conduct the trial immediately or fix a time for the trial, giving due regard to the needs of the parties to consult with counsel and to prepare for the trial.

(c) Trial

(1) Procedure. The trial shall be conducted as are trials of petty offenses in the district court by a district judge without a jury.

(2) Record. Unless the Defendant waives in writing keeping of a verbatim record, proceedings under this rule shall be taken down by a reporter or recorded by suitable sound recording equipment.

Oklahoma City Air Materiel Area Tinker Air Force Base (Air Force Regulation) 125-37, Supplement 2 provides in pertinent part as follows:

6b.1 Entry Control Procedures for Tinker Air Force Base:

a. This supplement applies to members of the general public as well as Air Force personnel. *Personnel*

with identification other than those identified in b, c and d below are prohibited from entering into Tinker Air Force Base.

b. The following personnel identification will be recognized at all perimeter gates for base admittance:

(1) AFLC Form 80, "Interim Identification."

(2) AFLC Form 80F, "Temporary Credential."

(3) AFLC Form 80M, "Identification Credential."

(4) DD Form 2 series: 2AF—Air Force; 2A—Army; 2N—Navy; 2MC—Marine Corps; and 2CG—Coast Guard.

(5) DD Form 1173, "Uniformed Services Identification and Privilege Card."

(6) PHS 1866-1, 2 and 3, "US Public Health Service."

(7) General Accounting Office Credentials.

(8) Federal Bureau of Investigation Credentials.

(9) Civil Service Commission Credentials.

c. Subject to the security requirements as determined by the installation commander, the following personal identification may be recognized at Gates 1 and 2 for base admittance:

(1) CAP Forms 14 and 16, "Civil Air Patrol."

(2) Boy Scout Registration Card of Pack 116, Post 116, Troop 67.

(3) Membership card of auxiliary or associate members of the Tinker AFB Officers' and NCO Open Messes.

(4) Membership cards of Tinker AFB Rod and Gun Club.

d. Subject to security requirements as determined by the installation commander, *personnel with identification other than those described in 6b and c above may be authorized admittance to Tinker Air Force Base under the following procedures*:

(1) Visitors desiring admittance to Tinker Air Force Base must state the nature of their visit and the person or activity to be visited, to Security Police Division personnel.

(a) Statements submitted in accordance with 6b. 1d(1) above will be verified by Security Police personnel prior to the issuance of identification of an admittance to base.

(b) Monitors for major staff offices, OCAMA, and tenant organizations are authorized to verify visitor's admittance statements to Security Police Division. Military personnel may verify individual guests as authorized by 6b.1(d)(2) below.

(c) Upon verification visitors will be issued proper identification.

(d) Visitors must retain issued identification on their persons at all times until exiting base.

(2) Military personnel are authorized guests in the housing area or for social functions at designated areas. Guests must be in the physical presence of the military member or one of his dependents at all times when outside the housing area or area designated for social functions.

(3) Civilian members of the Officers' and NCO Open Messes otherwise qualified for admittance in their own right may bring guests to social functions at the Messes.

(4) Law enforcement officers and firemen in uniform, on official business, will be permitted entry without the issuance of identification.

(5) Personnel escorted under the procedures of OCAMAR-TAFBR 190-3 will not require issuance of individual identification.

Statement of the Case

The petitioners, eight men and four women, were convicted under Title 18, United States Code, section 1382 on a charge of ". . . knowingly, willfully, and unlawfully enter[ing a] military reservation *for the purpose of violating a lawful regulation* prohibiting the entry upon or into said . . . reservation without the consent or permission of the Commanding Officer . . . ." [emphasis supplied].

Prior to their trial, in a consolidated motion to dismiss the information, petitioners challenged their prosecution on the grounds that the Tinker Air Force Base regulation they were alleged to have violated had been improperly promulgated and was, therefore, invalid; that the regulation did not prohibit what the information alleged, but merely established an identification procedure for visitors desiring to enter the base; and that, in any event, the government's reliance on the regulation as a basis for criminal prosecution was constitutionally impermissible on due process grounds. Both this motion and petitioners' consoli-

dated request for a jury trial were denied by the District Court with opinions which are set out in the Appendix, *infra*, pp. 15a-34a.

The events which led to petitioners' convictions were as follows. On May 3, 1972 the Commander of Tinker Air Force Base ordered that an identification system be put into effect at all gates of entry into the base, prohibiting persons without authorized identification from entering the base [R. 42-43]. Prior to May 3, 1972 only certain areas of the base were designated as "Controlled Areas" [AFR 125-37 TAFB Supp. 1] and the Commander was authorized only to remove but not to arrest civilian persons who violated a base regulation, and to forbid them from re-entering the base [R. 45-46, 54].

On May 4, 1972, less than twenty-four hours after the Commander's promulgation of the order requiring identification as a condition of entry onto the base, but before the order was posted, petitioners and others gathered peacefully at the main gate [R. 180]. Several persons, including petitioners, indicated that they wished to meet with the Base Commander to deliver a statement registering their opposition to recent events in the Vietnam War [R. 68, 231]. They were given no notice of the identification system which had gone into effect the day before; they were not asked by the security guards at the base gate to supply any of the authorized forms of identification, including a driver's license [R. 42-43, 124]; and, as the Base Commander himself testified, they could not possibly have known about the regulation which they were subsequently arrested for violating since it was not posted at any of the base gates [R. 47-48, 56, 190, 256].

When petitioners and others had stopped approximately fifty feet inside the base they were told to leave but were still given no notice of the new regulation. When they failed to leave they were arrested, notwithstanding their peaceful conduct which in no way interfered with vehicular or personnel traffic or otherwise interrupted the operation of the base [R. 180].

Nowhere does the trial record contain any evidence that the petitioners intended to violate a lawful Air Force regulation by entering the Base. Nevertheless, they were convicted as charged and sentenced as follows: the four women were given suspended sentences and one year's probation; six of the men were sentenced to four month prison terms; and the other two men were each given maximum sentences of six months in prison and were assessed fines in the amount of $250 and $500 respectively.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below is in direct conflict with the requirement that specific intent to enter a military base in violation of a lawful regulation be proved to sustain a conviction under the first paragraph of 18 U.S.C. section 1382.

When Congress made it a crime to enter a military base "for any purpose prohibited by law or lawful regulation," it implied that both the prohibition and the unlawful purpose must be shown. In *Holdridge* v. *United States,* 282 F.2d 302, 309 (8th Cir. 1960), Judge (now Mr. Justice) Blackmun pointed out that such an interpretation is essential to protect the innocent trespasser from prosecution.

Congress could not have intended that the mere coincidence of entry onto a military reservation and the violation of a base regulation prohibiting speeding or running a stop sign would subject a person to prosecution under the statute. It is well settled that unauthorized entry onto a military reservation is not, per se, blameworthy, *Flower* v. *United States*, 407 U.S. 197 (1972); *Spock* v. *David*, 41 L.W. 2242 (3rd Cir., 1972); *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Cal. 1966). It becomes so, within the meaning of paragraph one of section 1382, only when accompanied by a specific intent to violate a lawful regulation. Cf. *United States* v. *Freed*, 401 U.S. 601 (1970).

Mr. Justice Blackmun's construction of section 1382 for the Eighth Circuit is in direct conflict with the holding of the Tenth Circuit in its decision below. In *Holdridge*, the court pointed out:

> [I]t seems clear enough, from the use of the words "for any purpose prohibited" in the first paragraph of the section, that motive is, to some extent at least, an element of the offense there defined. Purpose and the prohibition must both be proved. This interpretation affords some protection to the innocent trespasser.

This construction is essential to sustain the constitutionality of the first paragraph of section 1382, but it was not applied by the court below. This Court has long established that a statute setting forth criminal penalties for the violation of a separate regulatory scheme cannot be used as the basis for a prosecution unless the defendant had a specific intent to violate the regulatory scheme. *Lambert* v. *California*, 355 U.S. 225 (1957); accord *Smith* v. *California*, 361 U.S. 147 (1959). In *Lambert*, the petitioner's failure to

register with municipal authorities as a convicted felon was held to constitute an omission which could not be elevated to a criminal offense without proof that the petitioner had *actual notice* of the registration requirement and therefore specifically intended to violate it. In the instant case the record is utterly devoid of proof that petitioners had notice of the identification requirement they were charged with violating when they entered the base. Indeed, several of the government's witnesses testified that petitioners could not possibly have known about the regulation containing the requirement because it was not posted at the gate where they entered. "Where a person did not know of the duty . . . and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." *Lambert* v. *California,* 355 U.S. at 229.

The holding of the court in *Holdridge* that the second paragraph of section 1382[1] does not require proof of specific intent is entirely consistent with this construction of the first paragraph of the section. In explaining the difference between the two sections Mr. Justice Blackmun pointed out that:

> This second paragraph is directed to re-entry after removal or after appropriate order not to re-enter. This paragraph thus involves a second invasion of the premises and one where the accused, because of his

[1] The second paragraph provides as follows:

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—shall be fined not more than $500 or imprisoned not more than six months, or both.

prior removal or the formal order, *is definitely aware that re-entry is prohibited.* [Emphasis supplied in part.] 282 F.2d at 308-09.

Other courts which have construed paragraph two of the statute have adhered strictly to the requirement that personal notification not to re-enter a base, or actual physical removal therefrom, be shown to sustain the conviction. See, e.g., *United States* v. *Seijo,* 281 F. Supp. 708, 710 (D. P.R. 1968); cf. *Weissman* v. *United States,* 387 F.2d 271 (10th Cir. 1967).

The specific knowledge or notice requirement implicit in the first paragraph of section 1382 is absolutely necessary to satisfy due process. "Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Lambert* v. *California,* 355 U.S. at 229. The holding of the court below is in direct conflict with this well established principle.

2. There is no evidence that petitioners intended to violate a lawful regulation when they entered Tinker Air Force Base, but rather they intended to exercise their First Amendment rights.

Cross-examination of the government's witnesses at trial revealed not only that the petitioners could not possibly have known about the regulation they were charged with intending to violate, but also that they had gathered peacefully to protest the Vietnam War and seek an audience with the Commanding Officer and that generally their activity did not disrupt the base [Tr. 179-80, 195, 231]. Furthermore, the general public was permitted to enter the base both before and after the regulation in question was promulgated

one day prior to petitioners' arrest, and the forms of identification sufficient to authorize entry under the new regulation included those as universal as a driver's license and as indiscriminate as a Boy Scout registration card [Tr. 42-43].[2] Petitioners were not told that they could not enter the base without the requisite identification, but were warned simply that their entry would result in their arrest.

This Court recently held that a conviction under the second paragraph of section 1382 could not be sustained where the defendant had sought to exercise his First Amendment rights on a military base generally accessible to the public, even though a base regulation prohibited such activity and he had previously been barred from the base for violating the regulation. *Flower* v. *United States,* 407 U.S. 197 (1972) (per curiam). For the same reason a base may not be "selectively closed" to civilians who intend to engage in peaceful political activities such as leafleting or campaigning for public office, *Spock* v. *David,* 41 LW 2242 (3rd Cir., 1972), nor may the commander of a "closed base" grant access to some members of the public but deny it to others because he disagrees with their views. *Jenness* v. *Forbes,* 41 LW 2270 (D.R.I., 1972).

Where the purpose of entering even a *restricted* military base touches the First Amendment, therefore, the prohibition must be construed narrowly to ensure that it is not discriminatorily applied and that it is invoked only to prevent "imminent lawless conduct," *Kiiskila* v. *Nichols,* 433

[2] Two Tinker Air Force Base regulations promulgated prior to May 3, 1972 established certain "controlled access" areas within the Base, but did not control access to the entire Base. Exhibits E and F to Supplemental Memorandum in Support of Defendants' Motion to Dismiss Information.

F.2d 745, 751 (7th Cir. 1970) or conduct intended to "promote disruption." *United States* v. *Bradley*, 418 F.2d 688, 691 (4th Cir. 1969).

In the instant case the record is devoid of evidence that petitioners' conduct either had or was intended to have such an effect. On the other hand, there is ample evidence that petitioners were engaged in protected First Amendment activity which they had no reason to believe ran afoul of any lawful base regulation at the time they entered the base. This Court should therefore grant certiorari to review the broad construction given by the court below to the prohibition in section 1382, in direct conflict with the decisions of this Court and other federal courts regarding the prohibition of First Amendment activity by civilians on military bases.

3. Since petitioners were charged with a petty offense and elected to be tried before a district judge, they were entitled to a trial by jury as guaranteed by the Sixth Amendment to the Constitution since this right has not been specifically taken away by Congress.

18 U.S.C. §1382 provides that any person who goes upon a military reservation for any purpose prohibited by law or any lawful regulation shall be fined not more than $500.00 or imprisoned not more than six months or both. The penalty clearly puts the offense into the "petty offense" category of 18 U.S.C. §1(3). This offense also falls within the "minor offense" category of 18 U.S.C. §3401 (f).

The question here is whether a person who elects to be tried before a district judge under the provisions of 18

U.S.C. §3401 (b) is entitled to a jury trial even if he is charged with a petty offense. Section 3401 is silent about the right of a person charged with a petty offense to a trial by jury if he elects to be tried before a district judge. That section provides only that the Supreme Court shall prescribe rules of procedure and practice for the trial of cases before magistrates and makes no mention of any authority given to the Supreme Court to prescribe rules of procedure concerning the trial of petty offenses before district court judges. Congress, however, has not expressly provided that a defendant who has elected to be tried before a district judge is not entitled to a trial by jury. Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, which states that a trial of a petty offense before a district court judge is to be tried without a jury, is therefore beyond the rule making power of the Supreme Court.

The Tenth Circuit held in the decision below that since petitioners were charged with a petty offense they had no right to a jury trial. In *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Cal. 1966), however, the District Court held that the defendants who were also charged with violating Section 1382, were entitled to a jury trial. The court noted that the federal statutes have no provision concerning whether a trial of a petty offense in the district court upon election of the defendant will be jury or non-jury.

As to those offenses for which a defendant is not guaranteed a trial by jury by the Constitution he is entitled to a jury trial unless Congress has provided to the contrary.

In *Callan* v. *Wilson*, 127 U.S. 540, 555 (1886) the Supreme Court stated that "there is a class of petty or minor offenses not usually embraced in public criminal statutes

and not of the class or grade triable at common law by a jury, and which [may] . . . *under the authority of Congress,* be tried by the court and without a jury . . . " (emphasis added). The District Court in *United States* v. *Bishop,* 261 F. Supp. at 971, after reviewing the English and common law right to a trial by jury, stated that "the right to a criminal jury was a protection generally in existence except where the positive law of Parliament or the colonial legislatures make explicit inroads upon it."

Because of the apparent conflict between the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates and the Federal Statute on the question, which has no provision concerning whether a trial of a petty offense in the district court upon election of the defendant will be jury or non-jury, the Court should grant the petition for a writ of certiorari to resolve this question.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

April 13, 1973

Nos. 72-1741 to 72-1752

Rehearing Denied May 31, 1973

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON RANDOLPH FLOYD *et al.*,

Defendants-Appellants.

BARRETT, Circuit Judge.

The appellants were convicted of going upon Tinker Air Force Base military reservation for the purpose of violating a lawful regulation prohibiting their entry without the permission of the commanding officer in violation of 18 U.S.C.A. § 1382. Section 1382 carries a fine of not more than $500 or imprisonment of not more than six months or both.

On May 4, 1972 the appellants and 75 to 200 others gathered at Gate Two at Tinker Air Force Base in Oklahoma City, Oklahoma to protest the war in Vietnam. A group of between 30 and 40 people crossed the "white line"

signifying entrance to the base. They were met by Lt. Col. George Malone who read them the following statement:

> The installation commander, Col. John C. Holley, United States Air Force, denies you permission to enter this military installation or to be physically present on its property.
>
> You are trespassing on a military installation of the United States. By order of the installation commander you will immediately remove yourselves from this military installation. If you do not immediately comply, you will be arrested and prosecuted by the federal authorities. You are advised that pursuant to Title 18 USC 1382 "whoever, within the jurisdiction of the United States, goes upon any military, naval, or coast guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months, or both." (R., Vol. II, p. 212)

The Appellant Flower then read a statement to Col. Malone. The group was asked to leave; instead, they sat down in the middle of the street and refused to leave. They were next placed on a bus and taken to Security Police Headquarters where they were photographed.

Tinker Air Force Base is one of the nation's largest military installations, with thousands of civilian employees. Reports had been received by the Base Commander several days before the gathering that a demonstration against the Vietnam War was going to be held on the base.

Some of the appellants plead guilty; others were tried by the Magistrate. These 12 appellants were tried by the U. S. District Court.

Air Force Regulation 125-37 was promulgated on July 27, 1964 by then Air Force Chief of Staff General Curtis E. LeMay. It established procedures to protect Air Force physical resources. Regulation 125-37 was revised and supplemented several times thereafter. On May 3, 1972 Col. John C. Holly, then Commander of Tinker Air Force Base, supplemented AFR 125-37 by the promulgation of OCAMA-TAFB Supplement 2 which effectively precluded the demonstrators from entrance because they did not qualify as "visitors". See United States v. Vaughan, 475 F.2d 1262 (10th Cir. 1973). The appellants were convicted under § 1382 of violating Supplement 2.[1]

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[1] Supplement 2 reads in part as follows: AFR 125-37, 27 July 1964, is supplemented as follows:

6b.1 ENTRY CONTROL PROCEDURES FOR TINKER AIR BASE:

a. This supplement applies to members of the general public as well as Air Force personnel. Personnel with identification other than those identified in b, c and d below are prohibited from entering into Tinker Air Force Base.

b. The following personnel identification will be recognized at all perimeter gates for base admittance: . . .

c. Subject to the security requirements as determined by the installation commander, the following personal identification may be recognized at Gates 1 and 2 for base admittance: . . .

d. Subject to security requirements as determined by the installation commander, personnel with identification other than those described in 6b and c above may be authorized admittance to Tinker Air Force Base under the following procedures:

(1) Visitors desiring admittance to Tinker Air Force Base must state the nature of their visit and the person or activity to be visited, to Security Police Division personnel.

(a) Statements submitted in accordance with 6b.1d(1) above will be verified by Security Police personnel prior to the issuance of identification or an admittance to base.

(b) Monitors for major staff offices, OCAMA, and tenant organizations are authorized to verify visitor's admittance

The appellants contend that: (1) the trial court erred in denying them a jury trial; (2) Supplement 2 is void and violates the due process clause; (3) the trial court penalized them for standing trial; and (4) the trial court erred in overruling their motion for judgment of acquittal.

I.

The appellants contend that they were entitled to a trial by jury because of the seriousness with which a violation of § 1382 is regarded by the community. The District Court ruled against them in United States v. Floyd, 345 F.Supp. 283 (W.D. Okla. 1972), holding that a violation of § 1382 is a petty offense which does not entitle the defendants to a jury trial, and further that Article III, Section 2, Clause 3 and the Sixth Amendment of the United States Constitution do not extend to petty offenses. A petty offense is defined in 18 U.S.C.A. § 1(3) as: "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both . . ." If an offense is *malum in se* it may be serious enough to require a jury trial even though it qualifies as a petty offense. District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930). The offense here is *malum prohibitum*. Congress has not been silent on this subject as the appellants suggest. It has intended that there be no jury trial for a petty offense. 18 U.S.C.A. § 1(3). If the

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statements to Security Police Division. Military personnel may verify individual guests as authorized by 6b.1(d)(2) below.

(c) Upon verification visitors will be issued proper identification.

(OCAMA-TAFB, Supplement 2, AFR 125-37, 3 May 1972)

(continued on following page)

offense is a petty offense within 18 U.S.C.A. § 1(3) and is not otherwise a serious offense under prior U.S. Supreme Court decisions then a jury trial is not required. Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). The reasoning of the District Court is sound. The evidence supports its holding. See United States v. Floyd, *supra*. The violation of Section 1382 here involved constitutes a petty offense not requiring a trial by jury.

II.

The appellants allege that TAFB-OCAMA Supplement 2 to AFR 125-37 is void because it was never lawfully adopted. They also contend that Supplement 2 violates the due process clause because it established only policies which cannot be criminally violated and that it is void for vagueness because it failed to announce the acts it forbids.

The appellants argue that Supplement 2 is void because it was not promulgated in compliance with the Federal Register Act, 44 U.S.C.A. § 1501 et seq. and the Administrative Procedure Act, 5 U.S.C.A. § 500 et seq.

We hold that there is no merit in this argument. Both are, in effect, "notice" statutes intended to protect persons who have no *actual notice* from in any manner being adversely affected. It is unrealistic to contend that "closed base" commanders charged with the obligation of protecting the national security thereon, cannot adopt regulations effective immediately, even if only orally communicated to the base security personnel, so long as such regulations are thereafter communicated to one who wishes to enter upon the base. Neither the Federal Register Act nor the A.P.A. require publication of Supplement 2 on the facts of this case. In recognition of the needs involving national

security, we recently held that once one is within an area where base security is imposed, a search may be conducted without probable cause, and without consent. United States v. Vaughn, *supra.*

The appellants contend that Supplement 2 is void because it was issued in direct violation of the controlling regulation it supplements, AFR 125-37. Paragraph 2 of AFR 125-37 provides in part as follows:

> Further, the on-base violation of a lawful regulation issued by a base commander may be sufficient to sustain the removal from the base of a person not subject to the UCMJ and to sustain a criminal prosecution of such a person for an unauthorized re-entry of the base under 18 USC 1382 even though the base regulation may not have been issued pursuant to 50 USC 797.
>
> (Para. 2, AFR 125-37, 27 July 1964)

Paragraph 4[2] of 125-37 announces mandatory steps which must be taken for subordinate regulations to have legal ef-

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[2] In general, to have legal effect for various categories of persons, any directive or regulation applying to the protection of USAF physical resources should meet the following requirements:

a. For persons subject to the UCMJ, it must:

(1) Be issued by order of the base commander. At bases utilizing civilian contractor guards, the authority to issue such directives *cannot* be delegated to the civilian contractor.

(2) Clearly describe, identify, and locate the property or area.

(3) State that specific permission of the commander is required to enter or use the particular area or resource.

(4) Be posted or otherwise displayed to insure that the individual has constructive or actual knowledge of the directive.

fect. The requirements in paragraph 4 generally pertain to prosecutions of offenses arising under 50 U.S.C.A. § 797 and the offense of re-entry after removal under 18 U.S.C.A. § 1382. The appellants were not charged with the crime which the regulation defines. It is within the sole discretion of the commanding officer of a "closed base" to promulgate rational regulations excluding people from the military installation in the interest of the national security. He has practically exclusive and extensive power to exclude persons from the base in the interest of good order and military discipline. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971).

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b. For persons not subject to the UCMJ, to sustain removal and order not to re-enter under 18 USC 1382, it must:

(1) Meet the requirements stated in a (1) through (3) above.

(2) Direct removal and forbid re-entry, in the name of the base commander.

c. For all persons within the US, its territories and possessions, it must:

(1) Meet the requirements stated in a (1) through (3) above.

(2) Have been issued by a person designated in DOD Directive 5200.8.

(3) Be posted in a conspicuous and appropriate place. For standardization, the display of such a directive at gates of bases or areas will satisfy this requirement.

(4) Pertain to one of the subjects listed in 50 USC 797.

(5) State that it was issued under the DOD directive and the statute. The notice to the public incident to the issue of the regulation must also contain the same statement.

(6) Cover a physical area that is subject to USAF jurisdiction, administration or custody.

(Para. 4, AFR 125-37, 27 July 1964)

The 4th Circuit recently held in Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973), that where military reservations are open to the public it is now clear that civilians have an unqualified right to enter these public areas to exercise their constitutional right to freedom of expression. Where the area is open to the public the base commander has no discretion but has a ministerial duty to allow leafletting. However, when the military reservation is a "closed base",[3] the base commander at Tinker had the authority to determine the degree of control over personnel entering or leaving the base. Para. 6b, AFR 125-37, 27 July 1964.

The appellants challenge whether posting a sign outside the confines of Tinker Air Force Base sufficiently conveys actual notice of Supplement 2. The large sign reads as follows:

WARNING

U.S. AIR FORCE BASE

IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH

(Sec. 21, Internal Securities Act of 1950: 50 U.S.C. 797)

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[3] *Closed Base.* It will be:

(a) Posted with warning signs at all perimeter gates and along the base perimeter.

(b) Patrolled internally by air police forces in vehicles. Air police forces will be assigned at perimeter gates, when open, to control personnel and vehicle traffic.

(c) Fenced around the perimeter, when practicable.

(Paragraph 6(a)(1), AFR 125-37, 27 July 1964)

To be sure, the sign does not convey actual notice of the entire content of Supplement 2. It was not, however, the only notice that the appellants had that Tinker Air Force Base was a controlled entry installation. They were warned by the sign, the five security guards, and the fence around the installation. In any event there can be no question that the sign and the security guards gave the appellants *actual notice* that they could enter *only* with the permission of the base commander. The record is clear that they were informed of his denial of their right of entrance before they entered the base.

The appellants argue that Supplement 2 violates the due process clause of the Fifth Amendment to the United States Constitution in that it is void for vagueness, and that it establishes guidelines only, thereby lacking the sufficient enjoinder required of prohibitive regulations.

AFR 125-37 grants the base commander the authority to determine the security to be imposed on personnel entering or leaving the base. Paragraph 6b, AFR 125-37, 27 July 1964. Pursuant thereto the Base Commander promulgated Supplement 2 on May 3, 1972. Twenty-five copies of Supplement 2 were sent to the security guards at the gates. The procedures set forth in Supplement 2 prohibit all persons who do not possess proper identification from entering the base. The language is plain. Those who have proper identification may enter the base and those who do not have such identification may not enter the base. Courts do not require the same precision and specificity of standards in military regulations as in criminal statutes. Dash v. Commanding General, Fort Jackson, South Carolina, 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied 401 U.S. 981, 91 S.Ct. 1192, 28 L.Ed.2d 333 (1971). We agree with the District Court which stated:

It is not significant or prejudicial to the Defendants that the Information describes the regulation as one prohibiting the entry upon the military reservation "without the consent or permission of the Commanding Officer," rather than "without proper identification." Such language is merely descriptive of the regulations, which speaks for itself. The important fact is that the regulation prohibited entry to certain persons. It becomes a matter of proof as to whether the Defendants were such persons and intended to enter the base knowing that they were so prohibited. (R., Vol. I, pp. 130, 131)

III.

The appellants allege that the trial court penalized them for exercising their right to stand trial in the District Court. Those who pleaded guilty before the Magistrate were given suspended sentences except for one defendant who received a one-year probation. Those who pleaded not guilty and who were tried by the Magistrate received suspended sentences except for one defendant who received a two-year probation. Of the twelve defendants who were tried in the District Court, the women received probationary terms, while the men received prison terms of from 4 to 6 months plus varying fines.

In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), the Court held that a person may not be punished because he has, in good faith, exercised his right to stand trial, even though his effort proves unsuccessful, and that it is improper to make his sentence more severe because he has done so. There is no evidence in the record to support the application of this rule to these appellants. We have held

and now hold that when the sentence is within the limit prescribed by the statute, the length of the sentence imposed is within the discretion of the trial court and will not be disturbed by the reviewing court. United States v. Stidham, 459 F.2d 297 (10th Cir. 1972), cert. denied 409 U.S. 868, 93 S.Ct. 168, 34 L.Ed.2d 118 (1972); Andrus v. Turner, 421 F.2d 290 (10th Cir. 1970); Martin v. United States, 364 F.2d 894 (10th Cir. 1966). The sentences imposed on the appellants were within the statutory limits.

IV.

The appellants contend that the trial court erred in overruling their motion for judgment of acquittal because the Government failed to prove each essential element of the crime beyond a reasonable doubt.

On appeal the evidence is considered in the light most favorable to the Government. United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970). Although the Government conceded that the identification procedure in the early part of the trial did not clearly reflect the names of the appellants, the trial court had an opportunity to observe those persons who were identified during the trial. There was no error.

The appellants contend that the motion for a judgment of acquittal should have been granted because the Government presented no evidence of their purpose or intent to enter the Base without permission of the Base Commander. Intent and purpose may be inferred from the facts and circumstances surrounding the case which reasonably tends to demonstrate mental attitude. United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972); Cummings v. United States, 289 F.2d 904 (10th Cir. 1961), cert. denied 368 U.S. 850, 82 S.Ct. 63, 7 L.Ed.2d 48 (1961). The warning sign posted at the entrance to the Base just north of Gate Two was

visible to anyone who walked or drove onto the base. It states that permission to enter is required. The closed Base, evidenced by the guards, the warning sign, and the fence, gave due notice and warning to the demonstrators that they were approaching a military installation involving the national security. Officer Twomey attempted to hold the group back. He told them that they were not allowed on the Base unless they had permission of the Base Commander. Appellant Tom Flowers asked Officer Maddox what would happen if they crossed the "white line". He was told they would be arrested. Upon entering Col. Malone told them to leave. He read them the warning. In lieu of obeying, they sat down and refused to leave. They carried placards protesting the war in Vietnam. Their intent to enter the base without permission and their intent to demonstrate against the Vietnam war on the Base may be reasonably inferred from these facts.

The appellants allege that the Government failed to prove the location and jurisdiction of the Court beyond a reasonable doubt. This contention has no merit. The trial court properly took judicial notice that Tinker Air Force Base is within the Western District of Oklahoma. United States v. Carter, 430 F.2d 1278 (10th Cir. 1970). The trial court did not err in denying their motion for judgment of acquittal.

Affirmed.

Order Denying Petition for Rehearing

MAY TERM—MAY 31, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges.

Nos. 72-1741 thru 72-1752 Inclusive

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JON RANDOLPH FLOYD, TOM FLOWER, HELEN JILL FOLL, WILLIAM ALEXANDER FREEMAN, HOLLIS ANN FULTZ, JEFFREY N. HERREN, JAMES ALAN HINDMAN, DANNY O. NOLAN, MARIA ELIZABETH PASCALE, WILLIAM LEROY PATCHETT, ELLEN LOUISE WOODLEE, and MICHAEL PHILLIP WRIGHT,

Defendants-Appellants,

and

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Amicus Curiae.

This matter comes on for consideration of the Petition For Rehearing En Banc filed by the Appellants in the captioned companion cases.

Upon consideration whereof, the Petition for Rehearing En Banc is denied.

HOWARD K. PHILLIPS
Clerk

A true copy
Teste

HOWARD K. PHILLIPS
Clerk, U. S. Court of
Appeals, Tenth Circuit

By ANNE CABAT
Deputy Clerk

Order on "Motion and Demand for Jury Trial"

[Filed July 11, 1972]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

Cr. 72-175

Violation 18 USC § 1382

UNITED STATES OF AMERICA,

Plaintiff,

v.

JON RANDOLPH FLOYD, TOM FLOWER, HELEN JILL FOLL, WILLIAM ALEXANDER FREEMAN, HOLLIS ANN FULTZ, JEFFREY N. HERREN, JAMES ALAN HINDMAN, DANNY O. NOLAN, MARIA ELIZABETH PASCALE, WILLIAM LEROY PATCHETT, ELLEN LOUISE WOODLEE, MICHAEL PHILLIP WRIGHT,

Defendants.

ALL THE DEFENDANTS have joined in a motion and demand for jury trial. All are charged jointly by Information with violation of Title 18 U.S.C. § 1382, in that they did knowingly, wilfully, and unlawfully enter the Tinker Air Force Base, a military reservation, for the purpose of violating a lawful regulation prohibiting the entry upon and into said military reservation without the consent and permission of the commanding officer. The maximum punishment is imprisonment for six months and a fine of $500.

Defendants assert a constitutional right to trial by jury, but that in any event they are entitled to a jury trial because Congress has not expressly provided otherwise. Article III, § 2, Clause 3 of the Constitution of the United States provides that the trial of all crimes, except in cases of impeachment, shall be by jury. Under the sixth amendment, an accused, in all criminal prosecutions, has the right to a speedy and public trial by impartial jury. The constitutional imperative does not, however, extend to that "class or grade of offences called petty offences, which according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose." *Callan* v. *Wilson*, 127 U.S. 540, 557 (1888). As stated in *Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968):

> "So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."

Counsel suggests there is a split of authority as to whether a jury trial is required for a petty offense. Cases of the United States Supreme Court refute this. "It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty of-

fenses." *Bloom* v. *Illinois*, 391 U.S. 194, 210 (1968). No decision of our highest court holds otherwise.

The essential injury, then, is not whether the Constitution requires a jury trial for a petty offense, but whether the defendants are charged with a "petty offense." If it is a petty offense, the constitutional right to a jury trial does not exist. If it is not, the court must grant the defendants' request.

Congress has defined a petty offense as follows: "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." 18 U.S.C. § 1(3). The present charge is obviously within that definition.

The Supreme Court has, however, utilized other criteria in determining whether a particular offense is "petty" or "serious." In *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1930), the court said:

> "Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense."

In that case, the defendant was convicted of driving recklessly "so as to endanger property and individuals." The relevant statute provided for punishment by not more than a $100 fine or thirty days imprisonment. The court found that the offense was *malum in se*, indictable at common law, and "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense." The charge in the present case is not *malum in se*, but *malum prohibitum*. It becomes an

offense under 18 U.S.C. § 1382 only because some statute or lawful regulation prohibits entry without permission. *United States* v. *Bishop*, 261 F. Supp. 969 (N.D. Calif. 1966).

At other times, the Supreme Court has looked principally to the length of the maximum possible sentence to determine if a jury trial is required. In *Duncan* v. *Louisiana*, *supra*, at 161, the court held that a crime for which the punishment could be two years could not be labeled a petty offense:

> "In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans*, *supra*, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial and it was error to deny it."

In the most recent case treating the right to a jury trial, *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970), the court held that where possible penalty exceeds six months, the defendant cannot be denied a jury trial:

> "One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications."

Here, the defendants cannot possibly receive more than six months imprisonment, and it would appear likewise that the benefits resulting from the expeditious nonjury determination of guilt or innocence outweigh any possible disadvantage to the defendants.

In other cases, the court has ignored the maximum possible sentence and considered the sentence actually imposed. In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), a sentence of six months was imposed in a contempt proceeding. The court viewed the proceedings as equivalent to a procedure to prosecute a petty offense, and therefore, the defendant was properly convicted without a jury. *See also Frank* v. *United States*, 395 U.S. 147 (1969).

By every suggested standard, the charge against the defendants in this case is a petty offense, not triable by jury under the Constitution. The only other court considering this specific statute has reached this same conclusion, *United States* v. *Bishop, supra,* principally relied upon by the defendants.

The conclusion that the offense charged is a petty offense for which no constitutional right to jury trial exists would seem to be dispositive of the defendants' demand, but in *Bishop,* the court proceeded to hold that a defendant is entitled to a jury trial unless Congress has specifically provided to the contrary. *Compare United States* v. *Beard,* 313 F. Supp. 844, (D. Minn. 1970), in which the court concluded that where Congress had not spoken on the subject, the granting of a jury trial rested within the court's discretion. Counsel for the defendants now urges the reasoning of *Bishop* upon this court. We must reject the reasoning and the conclusion. We find no basis for the assumption that Congress has been silent on this issue. By its very definition of "petty offense" in 18 U.S.C. § 1(3), it has manifested an intent that there be no jury trial. Since it was the rule at common law and under the uniform rulings of the Supreme Court that a petty offense was triable without a jury, it would be unrealistic to suppose that Congress was unaware of this most important characteristic of a petty offense in making this classification. The very purpose of classification is to attribute certain characteristics to the class. There is no reason for a subdivision of misdemeanors of minor gravity if such petty offenses are to be treated as are all other misdemeanors. It is significant that the principal cases relied upon by the court in *Bishop,* (*Callan* v. *Wilson, supra,* (1888), *Schick* v. *United States,* 195 U.S. 65

(1904), and *District of Columbia* v. *Colts, supra,* (1930)), were decided prior to the Congressional enactment of the petty offense classification on December 16, 1930.

In *Bishop,* the court looked at 18 U.S.C. § 3401, relating to trial by commissioners, and could discover no intention by Congress that the trial of a petty offense in district court be without a jury. Subsequent, however, to *Bishop,* Congress amended this section to provide the magistrate shall explain to a defendant charged with a minor offense, (a misdemeanor subject to a maximum punishment of one year imprisonment and $1,000 fine), that "he has a right to a trial before a judge of the district court and that he *may* have a right to trial by jury . . . " (Emphasis supplied.) By inference, Congress has recognized there might be minor offenses, i.e. petty offenses, in which there was no right to trial by jury in the district court.

Further, Congress, by limiting the punishment which may be imposed under 18 U.S.C. § 1382 to six months and $500, has included within the definition of the crime itself a judgment about the seriousness of the offense and therefore the right to a jury trial. *Frank* v. *United States, supra.*

There really is no basis to conclude that a right to jury trial exists outside the Constitution and statutes of the United States. The Supreme Court, in determining the right to jury, has indicated that if an offense can be treated as petty in the eyes of 18 U.S.C. § 1(3) and is not otherwise a serious offense under the prior decisions of the court, the denial of a jury trial is proper. *Cheff* v. *Schnackenberg, supra.*

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

"Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

The Note to subdivision (a) of the Advisory Committee on Rules states:

"1. This rule is a formulation of the constitutional guaranty of trial by jury, Constitution of the United States, Article III, Sec. 2, Par. 3: 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *'; Amendment VI: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.' The right to a jury trial, however, does not apply to petty offenses, District of Columbia v. Clawans, 57 S.Ct. 660, 300 U.S. 617, 81 L.Ed. 843; Schick v. United States, 24 S.Ct. 826, 195 U.S. 65, 49 L.Ed. 99, 1 Ann. Cas. 585; Frankfurter and Corcoran, 39 Harv. L.R. 917."

As the Note indicates, the rule embodies only the constitutional guaranty of a jury trial and contemplates that the district court is not required to grant a jury trial for a petty offense.

At the time *Bishop* was decided, there was in effect "Rules of Procedure for Trials Before Commissioners," adopted January 6, 1941, by the Supreme Court. Rule 2 of these rules provided, among other things, that the trial before the commissioner "shall" be conducted as are trials of criminal cases in the district court by a district judge in a criminal case where a jury is waived," but no reference was made in the rules concerning the trial in the district court.

The court said, at 973, "Significantly, there is no provision concerning whether a trial of a petty offense in the district court upon election of the defendant will be jury or non-jury," and found that there was no indication of an intent on the part of the Supreme Court as expressed in its rules that there should be no trial by jury when the defendant elects to proceed in the district court.

This argument is no longer valid. The Supreme Court, in a major departure from the former rules, has expressed itself on the requirement for a jury trial in the trial of petty offenses in the "Rules of Procedure for the Trial of Minor Offenses before United States Magistrates," promulgated January 27, 1971. Rule 2 provides that the magistrate shall inform a person charged with a minor offense other than a petty offense "that he has a right to a trial before a judge of the district court and *a jury,*" (emphasis supplied), unless he consents to be tried before the magistrate. Before the magistrate can conduct the trial, the defendant must waive in writing "Trial before a Judge of the District Court and *Jury,*" (emphasis supplied).

Rule 3 provides that the magistrate shall inform the defendant accused of a petty offense "of his right to trial in the district court." He must waive only the right to be tried before a judge of the district court before the magistrate may proceed. Rule 3 also specifically states that the trial before the magistrate shall be conducted "as are trials of petty offenses in the district court by a district judge without jury." By the distinction between the minor offenses and petty offenses in the rules, it is evident that the Supreme Court conceived only a right of trial by jury for minor offenses and rejected the proposition that a jury is constitutionally required in the trial of petty offenders.

And recently the Fourth Circuit in *United States* v. *Merrick*, —— F. 2d ——, (Fourth Cir. 5/18/72) held that a federal "petty offender" has no constitutional or statutory right to a jury trial.

Since the court finds no constitutional or statutory basis for a jury trial in this instance, the defendants' demand for a jury will be denied. If it were within the discretion of the court, the result would be the same. Because of the court's interest in the orderly administration of justice and the practical problems confronting the court in a case with multiple defendants, the advantages of an expeditious and relatively inexpensive adjudication by the court outweigh the benefits which might accrue to the defendants from a jury trial.

IT IS SO ORDERED.

Dated this 11 day of July, 1972.

FRED DAUGHERTY
United States District Judge

Order Denying Motion to Dismiss Indictment

[Filed July 11, 1972]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 72-175 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

JON RANDOLPH FLOYD, TOM FLOWER, HELEN JILL FOLL, WILLIAM ALEXANDER FREEMAN, HOLLIS ANN FULTZ, JEFFREY N. HERREN, JAMES ALAN HINDMAN, DANNY O. NOLAN, MARIA ELIZABETH PASCALE, WILLIAM LEROY PATCHETT, ELLEN LOUISE WOODLEE, MICHAEL PHILLIP WRIGHT,

Defendants.

ORDER

Defendants move to dismiss the Information filed against them in this case for the various reasons set out below. They are charged with a violation of 18 U.S.C.A. §1382, which reads in pertinent part as follows:

> "Whoever, within the jurisdiction of the United States, goes upon any military . . . reservation . . .

for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months, or both."

The Information charges Defendants under this Statute in the following language:

> "That on or about the 4th day of May, 1972 at Tinker Air Force Base, Oklahoma, on lands acquired for the use of the United States of America, and on lands constituting a military reservation over which the United States has exclusive jurisdiction and in the Western Judicial District of Oklahoma, [the Defendants] . . . did knowingly, willfully and unlawfully enter such military reservation for the purpose of violating a lawful regulation prohibiting the entry upon and into said military reservation without the consent and permission of the Commanding Officer all in violation of Title 18, United States Code, Section 1382."

Defendants' attack on the Information is two-fold. They claim that the statute and regulations are unconstitutional and that the Information fails to state an offense. The Constitutional claims are that:

1. The Statute is an invalid restraint of rights guaranteed by the First Amendment.

2. The Statute denies equal protection under the Fifth Amendment.

3. The Statute is an unlawful delegation of legislative authority in violation of the doctrine of separation of powers.

4. The Statute and regulations are vague and ambiguous within the meaning of the due process provision of the Fifth Amendment.

5. The regulations fail to adequately notify what is the forbidden conduct in violation of the Sixth Amendment.

6. The punishment provided by the regulations is disproportionate to the offense and constitutes cruel and unusual punishment in violation of the Eighth Amendment. Defendants' nonconstitutional claims are that:

(1) The regulations do not prohibit entry on a military base.

(2) The regulations merely establish conditions of entry.

(3) The regulations are void because they were not published in accordance with law.

Defendants' claims will be considered in the order set out above.

The Statute and regulations are not an unconstitutional abridgement of the Defendants' First Amendment rights. *Weissman* v. *United States,* 387 F. 2d 271 (Tenth Cir. 1967). Defendants did not see fit to brief this question and it does not merit further discussion.

In like manner, Defendants fail to brief the equal protection argument. The guarantee of equal protection is found primarily in the Fourteenth Amendment, which applies exclusively to State action. However, the Supreme Court has recognized that equal protection principles are contained in the Fifth Amendment guarantee of due process. *Bolling* v. *Sharpe,* 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693 (1954). In *Bolling,* however, the Supreme Court noted that due process and equal protection are not interchange-

able terms and the discrimination alleged must be so unjustified as to amount to a deprivation of due process. See also *Schneider* v. *Rusk*, 377 U.S. 163, 12 L.Ed. 2d 218, 84 S.Ct. 1187 (1964). Defendants' claim of discrimination seems to be based on the premise that the regulations involved here give commanders of military installations power to exclude persons therefrom whose views are not the same as their own. No claim is made that this was the case here. It is beyond rational doubt that military commanders have the power to exclude any person from their area of command and that their reasons for so doing are conclusive. *Weissman* v. *United States, supra*. The power lawfully exists; the reasons for its exercise in this case are not in issue on this Motion.

Defendants' next unbriefed contention is that the Statute unlawfully delegates the legislative function. This argument appears to be based on the supposition that the power to exclude any person from a military base permits a base commander to establish public policy, presumably by confining exclusions to persons possessing particular views. The whole argument is specious and falls of its own weight. 18 U.S.C.A. §1382 forbids entry on a military base for an unlawful purpose. The power to issue regulations does not derive from the Statute. See *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 6 L.Ed. 2d 1230, 81 S.Ct. 1743 (1961). Again, the power lawfully exists; the reasons for its exercise are not an issue on this Motion.

Defendants' next two constitutional claims will be considered together. The Defendants urge that the regulations are void because they are too vague and ambiguous and because they do not, in fact, prohibit the entry upon Tinker Air Force Base without the consent and permission of the

commanding officer. Under the scheme of these regulations, Tinker Air Force Base has been designated a "closed base." TAFB Supplement 1, 15 September 1967. The following minimum controls are mandatory for a closed base:

"(1) *Closed Base.* It will be:

(a) Posted with warning signs at all perimeter gates and along the base perimeter.

(b) Patrolled internally by air police forces in vehicles. Air police forces will be assigned at perimeter gates, when open, to control personnel and vehicle traffic.

(c) Fenced around the perimeter, when practicable." Para 6a(1), AFR 125-37, 27 July 1964.

The regulation prescribes that warning signs will be at each gate around the perimeter of the closed base as follows:

"WARNING

ENTRY IS PROHIBITED WITHOUT THE PERMISSION OF THE COMMANDER, ... AIR FORCE BASE. PERSONNEL ENTERING THIS AREA AGREE TO A SEARCH OF THEIR PERSON AND/OR VEHICLE IF DIRECTED BY THE ABOVE COMMANDER. (Sec. 21, Internal Security Act of 1950; 50 USC 797)" Para 10 AFR 125-37, 27 July 1964.

The basic regulation provides the base commander will determine the degree of control over personnel entering or leaving the base. Para 6b AFR 125-37, 27 July 1964. Pursuant thereto, the base commander of OCAMA and

Tinker Air Force Base, on May 3, 1972, promulgated OCAMA-TAFB Supplement 2. Para 6b.1(a) thereof provides:

> "Personnel with identification other than those identified in b, c and d below are prohibited from entering into Tinker Air Force Base."

Subparagraphs b and c deal with the admittance of personnel with previously issued credentials. Subparagraph d states:

> "Subject to security requirements as determined by the installation commander, personnel with identification other than those described in 6b and c above *may* be authorized admittance to Tinker Air Force Base under the following procedures:" (Emphasis supplied.)

These procedures to screen visitors may or may not result in the visitor receiving proper identification and being permitted to enter the base. The specific language of this order by the commanders of OCAMA and TAFB prohibits all persons who do not possess proper identification from entering the base. Nothing could be plainer. By this order, the commanders, in quite unequivocal language, have said those who have proper identification have consent to enter the base, and those who do not have such identification do not have consent and are therefore prohibited. It is beside the point to argue that the Defendants might have obtained the necessary identification and thereupon to have been admitted to the base. Such possibility does not render the regulation vague or ambiguous or otherwise destroy the positive prohibition against entry without consent, that is, without proper identification. Courts do not require the

same precision and specificity of standards in military regulations as in a criminal statute. *Dash* v. *Commanding General, Ft. Jackson, South Carolina,* 307 F. Supp. 849 (D.C. S.Car. 1969). It is not significant or prejudicial to the Defendants that the Information describes the regulation as one prohibiting the entry upon the military reservation "without the consent or permission of the Commanding Officer," rather than "without proper identification." Such language is merely descriptive of the regulation, which speaks for itself. The important fact is that the regulation prohibited entry to certain persons. It becomes a matter of proof as to whether the Defendants were such persons and intended to enter the base knowing that they were so prohibited.

Also not briefed is Defendants' contention that the *regulation* provides for a cruel and unusual punishment. The regulations here involved do not provide for any punishment. The Statute provides for punishment. The Defendants are charged with a crime under the Statute. The punishment provided by the Statute is not cruel and unusual. Our Circuit has affirmed the imposition of the maximum sentence under that Statute. *Weissman* v. *United States, supra.*

Defendants' first two nonconstitutional claims have previously been discussed in their constitutional dimension and further discussion here would serve no useful purpose.

Defendants' final nonconstitutional claim is that the regulations issued locally are invalid because they were not published in the Federal Register. Such is said to be the requirement of the Federal Register Act, 44 U.S.C.A. §§ 301 et seq. and the Administrative Procedure Act, 5 U.S.C.A. §§ 501 et seq. Defendants also contend that the

local regulations are void because not promulgated in compliance with AFR 125-37.

It is the Court's opinion and holding that the local regulations, OCAMA-TAFB Supplement 2, AFR 125-37 dated May 3, 1972 is not required to be published in the Federal Register. 44 U.S.C.A., §1505(a) provides in pertinent part as follows:

> "There shall be published in the Federal Register—(1) Presidential proclamations and Executive orders . . . (2) documents or classes of documents that the President may determine from time to time to have general applicability and legal effect; and (3) documents or classes of documents that may be required so to be published by Act of Congress."
>
> "For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect."

Defendants apparently rely on the last quoted paragraph of 44 U.S.C.A. §1505(a), for they cite cases dealing with regulations prescribing a penalty. The regulations here do not prescribe a penalty. It does not otherwise appear that the regulations fall within any of the other classes enumerated by the Statute.

The Administrative Procedure Act likewise contains no requirement of publication of the local regulation in the Federal Register. 5 U.S.C.A. §552(a)(1) provides in pertinent part as follows:

> "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—(A) descriptions of its central and field

> organization . . . (B) statements of the general course and method by which its functions are channeled and determined . . . (C) rules of procedure . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency
>
> . . .
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published . . ."

The regulation issued by the local commander which prohibited Defendants from entering the base does not fall within any of the classifications of the Statute. Even if it is within the Statute, the Government is entitled to show that they had actual notice.

Defendants question the legal status of the regulations issued by the Base Commander under the provisions of paragraph 4 of AFR 125-37, contending that it does not meet the requirements there established. In general, those requirements have to do with prosecutions of offenses arising under 50 U.S.C.A. §797 and the offense of reentry after removal under 18 U.S.C.A. §1382. Defendants are not charged with crimes with which the designated parts of these Statutes deal. Under 18 U.S.C.A. §1382, they are charged with entry with intent to violate a regulation, which is the first paragraph of the Statute, and not with reentry after removal, which is the second paragraph of §1382. Thus, whether the challenged regulation might be sufficient

to sustain a prosecution for an offense under 50 U.S.C. §797 or for an offense under the second paragraph of 18 U.S.C.A. §1382, is not here presented. If such regulation can be sustained as authorized on any basis, it is sufficient for the purposes of this offense. Under the explicit authority of AFR 125-37 and in the light of the historically unquestioned power of a commanding officer, in his discretion, to exclude any person from the area of his command under such restrictions as he may prescribe in the interests of security, good order and military discipline, there can remain no serious doubt of the authority to issue the challenged regulation. *Cafeteria & Restaurant Workers' Union, Local 473 AFL-CIO v. McElroy*, 367 U.S. 886 (1960).

Defendants' Motion to Dismiss is overruled.

It is so ordered this 11th day of July, 1972.

FRED DAUGHERTY